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No. 89-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HEALTHMASTER, INC., and HEALTHMASTER HOME HEALTH CARE OF GEORGIA, INC.,

Petitioners,

v.

CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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January 12, 1990

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RULE 28.1 LIST

Respondent Chattahoochee Valley Home Health Care, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

White v. United States,
___ U.S. ___, 110 S.Ct. 273, 107 L.Ed.2d 6 (1989)..... 2, 3

Miscellaneous:

Rule 29 of the Rules of the Supreme Court of the State of Georgia, 252 Ga. A-6 (1984)..... 5

Ga. Const., Art. 6, § 6, ¶ 5..... 4

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The respondent Chattahoochee Valley Home Health Care, Inc., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Georgia Supreme Court's opinion in this case. That opinion is reported at 259 Ga. 387, ___ S.E. 2d ___ (1989).

Although Petitioners' Statement of the Case contains certain misstatements of fact, those misstatements are not material to the issue of whether a writ of certiorari should be denied in this case.

REASONS FOR DENYING THE WRIT

Petitioners contend that this Court should review a decision of the Supreme Court of Georgia summarily vacating a writ of certiorari previously granted by that court. Petitioners concede that in Georgia, the decision whether to grant a writ of certiorari is entirely within the discretion of the Georgia Supreme Court. Nevertheless, Petitioners argue that a writ of certiorari, once granted, is a property right which cannot be revoked without notice and an opportunity to be heard.

Petitioners assert that "this issue has not previously been addressed directly by this Court." (Petition for Writ of Certiorari, hereinafter "Petition", at 6). That statement is inaccurate. In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), this Court dismissed a petition for writ of certiorari as improvidently granted. Although the Court explained its reasons for dismissing the writ in a detailed opinion, it also noted that such an explanation was not only unnecessary, but also unusual. *Id.* at 77. As indicated by Justice Frankfurter, the author of the majority opinion: *"[n]ormally for obvious reasons in view of our volume of business, no opinion accompanies dismissal of a writ as improvidently granted. . . . There is nothing unique about such dismissal even after full argument." Id.* (emphasis supplied). Thus, this Court has expressly approved the practice of summarily vacating writs of certiorari without opinions. Furthermore, this Court has itself frequently engaged in that practice. *See, e.g., White v. United States*, __ U.S. __, 110 S.Ct. 273, 107 L.Ed.2d 6 (1989); *Bryant v. Ford Motor Co.*, __ U.S. __, 109 S. Ct. 542, 102 L. Ed.2d 572 (1988); *Harbison-Walker Refractories v. Brieck*, 488 U.S. __, 109 S.Ct. 546, 102

L.Ed.2d 512 (1988); *Vermont v. Cox*, 484 U.S. 173 (1987); *Van Drasek v. Webb*, 481 U.S. 738 (1987).

Petitioners cite *Burrell v. McCray*, 426 U.S. 471 (1976) as support for their petition. Their reliance upon that case is misplaced. In *Burrell*, the majority, in a one-line opinion, dismissed a writ of certiorari as improvidently granted after the parties had already briefed and argued the case. Thus, in *Burrell*, as in numerous other cases, this Court engaged in the very practice which Petitioners contend was unconstitutional when committed by the Supreme Court of Georgia.

Petitioners correctly note that Justices Brennan and Marshall were sharply critical of the majority's decision to summarily vacate the writ in *Burrell*. Yet, the criticism of the dissenters in *Burrell* was not based upon constitutional principles of due process. *Id.* at 473-74. Rather, the dissent in *Burrell* must be limited to the particular facts of that case, particularly since Justices Marshall and Brennan have not dissented from subsequent summary writ dismissals by this Court as a matter of course. *See, e.g., White*, __ U.S. __, 110 S.Ct. 273, 107 L.Ed.2d 6; *Bryant*, __ U.S. __, 109 S.Ct. 542, 102 L.Ed.2d 572; *Harbison-Walker*, 488 U.S.__, 109 S.Ct. 546, 102 L.Ed.2d 512; *Vermont*, 484 U.S. 173; *Van Drasek*, 481 U.S. 738. Thus, even the dissent in *Burrell* provides no support for Petitioners' argument that the Georgia Supreme Court's dismissal of certiorari below "violates litigants' right to due process of law guaranteed by the Fourteenth Amendment." (Petition at 6).

There are sound reasons for the Georgia Supreme Court to follow the lead of this Court in summarily dismissing writs of certiorari in certain instances. A grant of

certiorari is based upon a preliminary examination of the issues raised in the petition. "Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present at the time of granting the writ, only later indicates that the grant was improvident." *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). Furthermore, the function of the Georgia Supreme Court is to review cases "which are of gravity or great public importance." Ga. Const., Art. 6, § 6, ¶ 5. Whenever a writ of certiorari is granted, "it is not so much for the benefit of the parties in the particular case, as in aid of the law itself and its administration." *Adair v. The Traco Division*, 192 Ga. 59, 65, 14 S.E.2d 466, 469 (1941). Once the court has determined that its preliminary assessment as to the importance of the case was erroneous, it does not necessarily "aid" the law or its administration for the court to then conduct a hearing on whether the writ should be dismissed or to issue a detailed opinion on its rationale for dismissing the writ. Having taken a closer look at the case and determined that it is not sufficiently important to merit review on certiorari, the court is justified in disposing of it in a summary fashion and proceeding to the numerous other more important matters which compete for its time and resources.

Petitioners rely upon two Alabama Supreme Court cases and an article from *Am. Jur. 2d* as support for the proposition that an appellate court has "no option but to hear and determine the cause" once it grants a writ of certiorari. (Petition at 6). The authorities cited by Petitioners merely establish that a few state appellate courts, unlike this Court and the Supreme Court of Georgia, do not

summarily dismiss writs of certiorari as improvidently granted. That those state courts engage in a different practice than the Georgia and United States Supreme Courts does not indicate that the practice of the latter courts is unconstitutional.

Finally, Petitioners analogize a writ of certiorari to a license or other property interest which, "once granted cannot be revoked without notice and an opportunity to be heard." (Petition at 7). Yet, the Rules of the Supreme Court of Georgia state that *"review on certiorari is not a right."* 252 Ga. A-6 (1984) (emphasis supplied). Thus, decisions regarding writs of certiorari rest entirely within the discretion of the Georgia Supreme Court. Furthermore, the *Rice* decision, and this Court's practice regarding the dismissal of writs of certiorari as improvidently granted, establish that a writ is not a property interest in the same sense as a license or certain governmental benefits.

Even assuming arguendo that a writ of certiorari is a property interest entitled to due process protection, that interest "was itself conditioned by the procedural limitations which had accompanied the grant of the interest." *Arnett v. Kennedy*, 416 U.S. 134, 135 (1974). The writ of certiorari granted by the Supreme Court of Georgia was conditioned by the procedural limitation that it might be summarily vacated. Petitioners should have been aware of this procedural limitation at the time the writ was granted since the Georgia Supreme Court had summarily vacated writs of certiorari on previous occasions. *See, e.g., Clark v. Morris*, 258 Ga. 543, 373 S.E.2d 512 (1988).

Petitioners' arguments are wholly without merit and, indeed, border upon the frivolous. The Petition does not present "special and important reasons" for granting review on writ of certiorari and should be denied. Sup. Ct. Rule 17.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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